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No. 87-1818

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ROBERT E. BADHAM, et al.,
Appellants,

VS.

MARCH FONG EU, et al.,
Appellees.

On Appeal From the United States District Court for the Northern District of California

MOTION OF THE ASSEMBLY OF THE STATE OF CALIFORNIA TO DISMISS OR AFFIRM

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INTRODUCTION

In *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797 (1986), this Court held that under certain limited circumstances claims of partisan gerrymandering may be entertained. Although claims of partisan gerrymandering had for good reason long been considered questions for the political branches, the plurality was concerned that insular political groups might be so shut out of the political process that judicial intervention may be necessary to protect those who cannot protect themselves. In doing so, however, this Court made clear that its intent was to protect the powerless, not to create another tool for the powerful. It rejected the claims of Indiana Democrats and it repeatedly described the threshold requirements so as to make it plain that healthy major political parties must use the political process, not the courts.

Thus, this Court held that a group claiming.partisan gerrymandering must show that it has "essentially been shut out of the political process." *Davis v. Bandemer*, 106 S.Ct. at 2814. Plaintiffs must show that the "electoral system is arranged in a manner that will consistently degrade [their] influence on the political process as a whole;" they must show a "history of disproportionate results . . . in conjunction with strong indicia of lack of political power and the denial of fair representation." *Id.* at 2810, 2814.

It is not remarkable, therefore, that the three-judge district court below found that California Republicans could not meet those sensible threshold requirements in this challenge to California's congressional districts.

Forty percent of California's congressional delegation is Republican, as are half of its United States Senators. Nationally, Republicans hold forty-five percent of the United States Senate and forty percent of the House of Representatives. The President of the United States is a California Republican. California's popular Republican Governor is eligible for reelection in 1990 and would have veto power over any new districting plan. Moreover, in times when Republicans do not control the Governor's office, they can and do resort to the initiative and referendum process. In 1982 California Republicans sponsored a successful referendum petition to invalidate the previous congressional districting plan; they had the same opportunity to eliminate the plan at issue here and did not take it. These are not the weak and powerless that stand before the Court.

Plaintiffs' appeal to this Court is premature, for neither the dissenting opinion nor the judgment has been entered below. But more importantly, the appeal is utterly without merit. California Republicans have both proportional representation in the congressional delegation and enormous political power in all aspects of the political process. The appeal should be dismissed or the decision below summarily affirmed.

STATEMENT OF THE CASE

Appellants' statement of the case is devoted almost exclusively to a description of the allegations of their third amended com-

plaint. The complaint, of course, speaks for itself. It consists almost entirely of allegations pertaining to the process of enactment of A.B. 2X and the alleged methods of gerrymandering that were employed.[1] To the extent that discriminatory effects are alleged they are stated in conclusory terms, such as the claim that A.B. 2X serves to "dilute and persistently degrade Republican votes." As we demonstrate below, the complaint boils down to a much repeated claim that election results are disproportionate to vaguely defined Republican voting strength and that incumbents win elections. *See* Jur. St. at 6-7; Third Am. Complaint ¶¶ 19-21, 26-29, Jur. St. App. at 40a-44a, 47a-51a.

Appellants' statement of the case lacks a clear account of the history of the litigation or the evolution of their third amended complaint, both of which are pertinent to the district court's

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[1] Because this matter arises on a motion to dismiss, the allegations of the complaint are taken as true. It should be noted, however, that many of appellants' claims are contradicted by judicially noticeable facts. (*See* section I-D below regarding claims of disproportionate representation). For example, appellants attribute the Legislature's late-1982 enactment of A.B. 2X to the fact that George Deukmejian won the November 1982 gubernatorial election. They neglect to note that in that same November 1982 election an initiative measure to establish a reapportionment commission was on the ballot but was defeated. Before the vote on this initiative, legislative efforts at reapportionment made no sense. After the people rejected a reapportionment commission, prompt legislative action was necessary and appropriate both because of the demands of California's election schedule and because the Legislature did not wish to repeat the experience of the 1970s when proposed redistricting plans bounced back and forth between the Governor and the Legislature for years, culminating in a court-ordered plan because the Legislature and the Governor were unable to agree. *See Legislature v. Reinecke*, 10 Cal.3d 396, 399 (1973). Notably, in addition to A.B. 2X (the congressional plan at issue here), *bipartisan* plans for the state Senate and Assembly, with broad support from state legislators of both parties, were also enacted in late 1982 and signed by Governor Brown shortly before he left office. *See* Cal. Elections Code, §§ 30010, 30011, 30020, 30021, 30022; Cal. Stats. 1983-84, 1st Ex. Sess., ch. 8, §§ 4, 6, 8; Cal. Const., art. IV, § 8(d).

decision to dismiss this case with prejudice. We therefore set forth that history of the case here.

Plaintiffs filed their original complaint on March 4, 1983, challenging A.B. 2X—California's congressional redistricting plan—on federal grounds and on three independent state law grounds. Plaintiffs' first amended complaint, filed March 31, 1983, added a fourth state law claim. The four state law claims were (1) that technical corrections to A.B. 2X violated the California Constitution;[2] (2) that the Legislature in enacting A.B. 2X violated California's constitutional "three-reading rule"; (3) that A.B. 2X was not substantially different from the 1981 redistricting plan which had been rejected by the California voters; and (4) that A.B. 2X did not comport with state constitutional standards regarding division of cities and counties and the like.

For the next two years plaintiffs resisted the three-judge district court's determination that under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the state courts should resolve the potentially dispositive state law claims in the first instance.[3] Finally, in June 1985, plaintiffs agreed to drop all state

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[2] Administrative corrections to both legislatively enacted and court ordered redistricting plans are a common occurrence in California. *See, e.g., Assembly v. Deukmejian*, 30 Cal.3d 638, 666 n.21 and 22 (1982); *Legislature v. Reinecke, supra*, 10 Cal.3d at 401; *Legislature v. Reinecke*, 6 Cal.3d 595, 604 n.3 (1972); *Silver v. Brown*, 63 Cal.2d 841, 846 (1966).

[3] Plaintiffs unsuccessfully sought two emergency writs in the Ninth Circuit to overturn the district court's abstention orders. They also unsuccessfully petitioned for certiorari in this Court. *Badham v. United States District Court*, 470 U.S. 1084 (1985). They actively resisted and delayed a state superior court suit brought by the Democratic Congressional Delegation seeking declaratory relief on the state law claims. They eventually asked the California Supreme Court to resolve the state law issues on an extraordinary writ, but demanded that it do so within thirty days. It refused. At one point, the district court, apparently frustrated with plaintiffs' maneuvers, found that they had not acted in good faith. *See Badham v. United States District Court*, Supreme Court Case No. 84-1226, appendix to Petition for Certiorari at 11a-14a.

law claims and the district court, at plaintiffs' request and without objection from defendants, lifted its abstention order and proceeded on plaintiffs' federal claims.

By that time this Court had before it *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797 (1986), which was set for argument on October 7, 1985, and which plaintiffs said presented an alleged gerrymander comparable to A.B. 2X. *See, e.g.*, Petition for Certiorari in *Badham v. United States District Court*, case No. 84-1226, at 6, 23 (claiming *Davis* and *Badham* are "remarkably similar" with "striking" parallels). The three-judge district court stayed all proceedings pending this Court's decision in *Davis v. Bandemer*.

After the decision in *Davis*, the three-judge district court ordered the parties to submit memoranda regarding the impact of *Davis v. Bandemer* and *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752 (1986), on the instant case. A status conference was held on September 19, 1986.

At the status conference, the district court called upon plaintiffs to file a third amended complaint alleging, to the best of their ability, the required elements for a cause of action under *Davis v. Bandemer*. It also set a schedule for filing of and briefing on motions to dismiss. Motions to dismiss were heard on December 5, 1986. At that time, plaintiffs' request to file a further amendment adding all of the Republicans in the California Congressional Delegation as plaintiffs was granted. The amendment was filed on January 13, 1987.

On April 21, 1988, a memorandum opinion and order was filed. Judge Poole, with Judge Zirpoli concurring, wrote the lead opinion determining that the third amended complaint failed to state a cause of action and should be dismissed with prejudice. Jur. St. App. at 2a *et seq.* Judge Zirpoli also wrote a separate concurring opinion noting that he was bound by the plurality opinion in *Davis v. Bandemer*, and implying that he doubted the justiciability of political gerrymandering claims. Jur. St. App. at 25a. Judge Schnacke noted his dissent and added: "A statement of my reasons will be filed in due course." Jur. St. App. at 26a. Neither the dissenting opinion nor the judgment has yet been

filed. *See* district court docket sheet lodged herein by appellants on or about May 16, 1988.

On April 28, 1988, plaintiffs filed their Notice of Appeal to the Supreme Court of the United States purporting to appeal from "the final judgment of the three-judge district court entered on April 21, 1988." Jur. St. App. at 29a. Subsequently, on May 4, 1988, plaintiffs filed their jurisdictional statement.[4] On May 23, 1988 this Court denied plaintiffs' motion to expedite consideration of their appeal.

ARGUMENT

I

THE DISTRICT COURT PROPERLY APPLIED *DAVIS v. BANDEMER* IN DISMISSING PLAINTIFFS' CLAIMS OF PARTISAN GERRYMANDERING

Appellants suggest that the question presented in this case is whether their challenge to California's congressional districts is "barred" by the fact that Republicans exercise political influence in "another jurisdiction or level of government." Jur. St. at i (Questions Presented). They accuse the district court of "rendering this Court's decision in *Davis v. Bandemer* a nullity" and say that it closed its eyes to "the egregious discriminatory effects" set forth in their complaint. *Ibid.* This is an entirely inaccurate

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[4] Because no judgment has been entered below, and Judge Schnacke's dissenting opinion has not yet been issued, plaintiffs' appeal is premature, and this Court is without jurisdiction. *See Goldstein v. Cox*, 396 U.S. 471, 477 (1970) (appeal proper under 28 U.S.C. § 1253 only from (1) final judgment granting or denying permanent injunction, or (2) interlocutory order granting or denying preliminary injunction); *see also Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383, 386-91 (1970) (dismissing appeal for lack of jurisdiction because, even though district court had found plaintiffs were entitled to injunction, no final injunction had yet been entered); *cf. Schmidt v. Lessard*, 414 U.S. 473, 475 (1974) (distinguishing *Gunn* on the ground that "there was in the present case a judgment entered 'in accordance with the Opinion' ").

description of the district court's opinion and of the record in this case.

The district court carefully and faithfully applied the plurality opinion in *Davis v. Bandemer*. Plaintiffs' third amended complaint alleges nothing more than disproportionate election results, which, even when persistent over time, have never been sufficient to support a gerrymandering claim under *Davis v. Bandemer* or the racial gerrymandering cases that preceded it.

Moreover, the fact is that Republicans in California enjoy proportional representation in the congressional delegation and have for years. Plaintiffs' assertions to the contrary are based upon a demonstrably misleading definition of "Republican voters" and flawed analysis of election results.

Finally, even if Republicans did not have proportional representation, their substantial political power and participation in all relevant state and federal arenas, including Congress and the California congressional delegation, make it impossible for these plaintiffs to state a cognizable claim of partisan gerrymandering.

A. The District Court Was True to Davis v. Bandemer

In *Davis v. Bandemer*, this Court for the first time opened the door to judicial review of partisan gerrymandering claims but held that the Indiana state legislative districts were not unconstitutional. Three members of the Court concurred on the grounds that political gerrymandering claims are nonjusticiable.[5] *See Davis v. Bandemer*, 106 S.Ct. at 2816 (O'Connor, J., concurring). Even the plurality, in allowing for limited judicial review, recognized that redistricting is a delicate political process into which the judiciary should venture cautiously, if at all, based on claims of partisan vote dilution. *See Davis*, 106 S.Ct. at 2811 (redistricting is "a political task for the legislature, a task that should not be

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[5] *Davis v. Bandemer* does not necessarily require a finding of justiciability here. The problems of political policy and lack of manageable standards that the Court addressed in the context of state legislative districts in *Davis* are much greater in the congressional context. We defer to the discussion of justiciability to be submitted by appellee the California Democratic Congressional Delegation.

monitored too closely unless the express or tacit goal is to effect its removal from legislative halls"); *id.* at 2816 (Court recognizes "the delicacy of intruding on this most political of legislative functions"); see also *id.* at 2817 (O'Connor, J., concurring) ("the legislative business of apportionment is fundamentally a political affair").

Awareness of these concerns led the *Davis* plurality to take precautionary steps: at the threshold, plaintiffs must make a "prima facie" case consisting of "allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions." *Id.*, 106 S.Ct. at 2811 (emphasis added).[6] The Court did not wish to extend an open invitation to litigation. Instead, it expressly discouraged partisan gerrymandering claims. *See ibid.*; O'Connor concurrence *passim.*[7] Thus

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[6] The plurality's approach in setting a high threshold requirement for relief is not necessarily as distant from the concurring justices' position of nonjusticiability as might at first appear. "[J]usticiability concerns . . . 'shade into those determining whether the complaint states a sound basis for equitable relief.' " *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1562 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974), *vacated* 421 U.S. 957 (1985).

[7] Most claims of partisan gerrymandering will fail the *Davis* test. This is particularly true of claims brought by the major political parties. *See Davis v. Bandemer, supra*, 106 S.Ct. at 2806 ("That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to enter such a case"). *See also id.* at 2810 n.12; *id.* at 2813 ("it could hardly be said that Democrats, any more than Republicans, are excluded from" the nomination process); *id.* at 2820 (O'Connor, J., concurring). Judicial refusal to intervene for Democrats or Republicans in swing states like Indiana and California is not a product of the decision below (*cf.* Jur. St. at 20-22), it is a product of the strict standards that this Court established in *Davis*. Nor should this result cause any concern. It is merely a reflection of the fact that the ebb and flow of political power between the two major parties allows them to

Davis requires that at the outset plaintiffs make a "heightened" showing of discriminatory effect. *Id.* at 2815 n.19.

Having established the requirement of a heightened showing, the *Davis* plurality explained the nature of the showing that must be made:

- that the group has been "denied its chance to effectively influence the political process" (106 S.Ct. at 2810);
- that there is a "lack of responsiveness by those elected to the concerns of the relevant groups" (*ibid.*);
- that "a history of disproportionate results appear[s] in conjunction with strong indicia of lack of political power and the denial of fair representation" (*id.* at 2814);
- that the plaintiffs have "essentially been shut out of the political process" (*ibid.*);
- that the "electoral system is arranged in a manner that will consistently degrade [their] influence on the political process as a whole" (*id.* at 2810, 2815-16).

Appellants, perhaps because their third amended complaint alleges none of these elements except disproportionate election results, would rewrite *Davis* to say that allegations of persistent disproportionate election results are sufficient to meet the heightened effects requirement. *See* Jur. St. at 18-20. They are answered and their argument rejected not only by *Davis* but by the body of jurisprudence developed in racial gerrymandering cases as well:

> [T]he power to influence the political process is not limited to winning elections. . . . This is true even in a safe district where the losing group loses election after election. Thus, a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional

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look after their own interests without judicial intervention in what is an essentially political process.

> representation alone does not constitute impermissible discrimination under the Equal Protection Clause.
>
> *Davis v. Bandemer, supra*, 106 S.Ct. at 2810.

See also id. at 2812, 2815; *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) (it is not a denial of equal protection "to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year").[8] The court below properly construed *Davis* as requiring it to look beyond election results to determine whether plaintiffs had fairly pled inability to influence the political process. Jur. St. App. at 9a-11a.

Appellants ignore most of the district court's analysis and argue that the court erred because it "relied almost exclusively on this Court's statement in *Bandemer* that: [¶] [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." Jur. St. at 11 (quoting *Davis*, 106 S.Ct. at 2810.) That is, of course, what this Court said in *Davis v. Bandemer*. But the district court did not rely exclusively on this statement in the plurality opinion. Rather, any fair reading of the district court's opinion demonstrates that it took the *Davis* decision as a whole and faithfully applied its letter and spirit.

The district court did not, as appellants suggest, ignore congressional election results in its analysis. Nor did it conclude, as appellants contend, that "appellants' right to fair and effective representation in Congress is irrelevant." Jur. St. at 12. Rather, the district court ruled—as *Davis* mandates—that election results standing alone are not dispositive. Thus it looked not only at election results but also at whether plaintiffs had alleged " 'strong indicia of lack of political power and the denial of fair representa-

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[8] In racial gerrymandering cases, courts have held that even a total absence of minority representatives over many years is insufficient to support a constitutional challenge without other indicia of a lack of political power and denial of fair representation. *See* section I-C below.

tion.' "[9] Jur. St. App. at 12a (quoting *Davis v. Bandemer*, 106 S.Ct. at 2814). It looked at Republican influence specifically in the House of Representatives and the Congress. *Id.* at 13a, 17a.[10] It looked at California Republicans' ability to influence—and to overturn by referendum—California's congressional redistricting plans in the 1980s. *Id.* at 17a-18a. And, as *Davis v. Bandemer* requires, it looked at the political process as a whole and concluded that "California Republicans represent so potent a political force that it is unnecessary for the judiciary to intervene, as we would be constrained to do to protect the trampled rights of a disadvantaged political or racial minority." *Id.* at 17a.

The legal standard that the district court employed was the standard announced in *Davis v. Bandemer*. As we demonstrate below, the district court was correct in concluding that application of that legal standard in this case required dismissal of the complaint with prejudice.

B. Plaintiffs' Third Amended Complaint Alleges No Discriminatory Effects Other Than Disproportionate Election Results

The court below found that the discriminatory effects alleged by plaintiffs in their third amended complaint amounted to disproportionate election results and nothing more. The court specifically addressed plaintiffs' argument, repeated here, that they had alleged "other invidious effects":

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[9] Because plaintiffs' third amended complaint was deficient in other critical respects, the district court found it unnecessary to resolve whether plaintiffs in fact enjoy proportional representation in the congressional delegation.

[10] As the district court said:

> Chief among our observations is our undisputed knowledge that California Republicans still hold 40% of the congressional seats, a sizeable bloc that is far more than mere token representation. It simply would be ludicrous for plaintiffs to allege that their interests are being 'entirely ignore[d]' in Congress when they have such a large contingent of representatives who share those interests.
>
> Jur. St. App. at 17a.

> [A]ll of the alleged "other invidious effects" are merely different ways of repeating [the] central allegation that A.B. 2X causes disproportionate election results. The language "discrimination based on political association" *might* be considered to allege an effect of the kind needed, but this single statement is conclusory and it is not supported by any other inference-generating facts alleged in the complaint.
>
> Jur. St. App. at 14a.[11]

A review of the third amended compaint fully supports the district court's analysis. The bulk of the complaint—and much of appellants' jurisdictional statement—is devoted to detailed allegations pertaining to legislative intent and justification, issues which need not be reached unless the requisite discriminatory effect is shown. *Davis*, 106 S.Ct. at 2813-15. Viewing the complaint in the light most favorable to plaintiffs, the allegations of discriminatory effect are limited to the following:

1. Plaintiffs assert a discriminatory effect in that the number of congressional seats in the California delegation won by Republicans since 1981 has been and through the 1980s will remain "grossly disproportionate" to the statewide cumulative vote for Republican congressional candidates. Third Am. Complaint, ¶ 20, Jur. St. App. at 41a. This same allegation is made over and over, in different words, throughout the third amended complaint, but it all boils down to the same allegation of disproportionate votes-to-seats ratio. For example, paragraph 3 alleges:

> Assembly Bill 2X operates to minimize or cancel out [plaintiffs'] votes and voting strength. Plaintiffs' votes are persistently degraded and diluted . . . [P]laintiffs do not have the same opportunity to elect candidates of their choice . . . as do Democrats; in fact their opportunity to do so is decidedly diminished . . . .
>
> Third Am. Complaint, ¶ 3, Jur. St. App. at 33a.

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[11] The court noted plaintiffs' further allegation that the allegedly "bizarre and irregular" shapes of the districts cause voter confusion and apathy. However, it also noted that the district shapes affected all congressional representatives, not just Republicans, and that similar

Similarly, paragraph 20 alleges:

> A.B. 2X is . . . designed and functioning to dilute, minimize and/or cancel out the votes and voting strength of Republican voters. . . . [It] allocate[s] congressional districts to Democrats in numbers far in excess of Democratic voting strength and to Republicans in numbers far below Republican voting strength. The effect is to control and distort the composition of California's Congressional Delegation throughout the 1980s. [It] locks in grossly disproportionate election results . . . [and results in] destruction of Republican incumbencies, the wasting of Republican votes, the minimization of Republican voters' opportunity to elect congressmen of their choice, the systematic elimination of political competition . . . .
>
> Third Am. Complaint, ¶ 20, Jur. St. App. at 41a.[12]

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claims had been rejected by this Court in *Davis v. Bandemer*. Jur. St. App. at 14a. Plaintiffs' assertions of voter apathy are, at best, the sort of generalized grievances that this Court has consistently declined to review. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219-27 (1974).

[12] We do not here repeat every variation of the plaintiffs' disproportionality allegation. The quotations in the text and the following are its principal reappearances:

> The A.B. 2X districts will result in the persistent degradation of Republican voting strength and dilution of Republican votes both statewide and district-by-district throughout this decade.
>
> Third Am. Complaint, ¶ 21, Jur. St. at 41a.
>
> As a result of A.B. 2X, Republican voters, including plaintiffs, individually and as a group are substantially disadvantaged in their opportunity to influence effectively the political process in the election of members of the United States House of Representatives and their votes are diluted and made less effective than the votes of Democrats. . . . The effect of A.B. 2X is to divide up the State's congressional districts in such a way as to allocate a substantial and permanent majority of seats to Democratic party candidates in percentages far superior to the statewide voting strength of Demo-

2. Plaintiffs also claim that "[e]ntrenched Democratic incumbents will continue to be reelected without need to attend to the views of fragmented and submerged Republican minorities in their districts and are insulated from those views by their overwhelming margins of victory." Third Am. Complaint, ¶ 28, Jur. St. App. at 50a.[13] Notably absent is any allegation that Democratic incumbents are, in fact, not responsive to the needs of their Republican constituents. Nor do plaintiffs suggest that their interests are inadequately represented by the eighteen Republican members of the California congressional delegation and the other Republican members of the House. *Compare Davis v. Bandemer, supra*, 106 S.Ct. at 2810 ("We cannot presume . . . without actual proof to the contrary, that the candidate elected will entirely ignore the interests of [minority party] voters. This is true even in a safe district where the losing group loses election after election") *with Rogers v. Lodge*, 458 U.S. 613, 625 (1982) (elected officials had been "unresponsive and insensitive to the needs of the black community") and *White v. Regester*, 412 U.S. 755, 767 (1971) (majority political organization "did not need the support of the Negro community to win elections . . . and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community").[14]

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cratic votes thereby maximizing the efficiency of Democratic votes and wasting Republican votes and rendering them ineffective.
Third Am. Complaint, ¶ 26, Jur. St. App. at 47a-48a.

[13] In a variation on this theme, plaintiffs allege that A.B. 2X resulted in "the systematic elimination of political competition" in California's congressional races. Third Am. Complaint, ¶ 20, Jur. St. App. at 41a; *see* Jur. St. at 8. This allegation contributes nothing toward making the high threshold showing required by *Davis v. Bandemer*, this Court has indicated no preference, let alone a requirement, for competitive districts. *Davis v. Bandemer*, 106 S.Ct. at 2809; 2814-15; *Gaffney v. Cummings*, 412 U.S. 735, 738, 752-54 (1973); *Whitcomb v. Chavis, supra*, 403 U.S. at 153.

[14] In *Washington v. Finlay*, 664 F.2d 913, 923 (4th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982), the Fourth Circuit, reviewing allegations of racial discrimination, described the element of unresponsiveness as follows:

In summary, then, the full extent of plaintiffs' allegations of discriminatory effect is that election results are and throughout the decade will remain "grossly disproportionate" and that incumbents will ordinarily win reelection.[15] Such allegations are utterly insufficient to state a claim for relief.

> [T]he mere fact that a particular apportionment scheme makes it more difficult for a group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from the perception that *the power to influence the political process is not limited to winning elections.*
>
> *Davis v. Bandemer, supra,* 106 S.Ct. at 2810 (emphasis added).

The courts "have found equal protection violations only where a history of disproportionate results appeared *in conjunction with strong indicia of lack of political power and the denial of fair representation.*" *Davis, supra,* 106 S.Ct. at 2814 (emphasis added). Plaintiffs' third amended complaint does not even begin to address these fundamental elements of a claim.

> [Plaintiffs must show] a degree of unresponsiveness to the needs and interests of the black minority so palpable that it compels—or even fairly supports—an inference that the minority's "voting potential" has been so effectively "cancelled out" that its residual "political strength" is presently being disregarded with confident impunity by the city's governing body.

[15] It is true that in paragraph 21 of the third amended complaint, plaintiffs make various allegations regarding the configuration of the districts and alleged gerrymandering techniques and label these "[t]he methodology and effects of the A.B. 2X gerrymander." Jur. St. App. at 41a-44a; *see also* Jur. St. at 7. This Court, however, has firmly rejected such attempts to obscure the issues by lumping various factors such as methodology and effects together:

> This undifferentiated consideration of the various factors confuses the import of each factor and disguises the essential conclusion of JUSTICE POWELL's opinion: that disproportionate election results alone are a sufficient effect to support a finding of a constitutional violation.
>
> *Davis v. Bandemer, supra,* 106 S.Ct. at 2815.

C. Plaintiffs' Claims Do Not Even Approach the Level of Discriminatory Effects That Have Been Required in Racial Gerrymandering Cases

This Court in *Davis v. Bandemer* and the three-judge district court below used racial gerrymandering cases for purposes of analogy. *Davis v. Bandemer, supra,* 106 S.Ct. at 2809, 2810 n.12; Jur. St. App. at 18a-19a. The court below rightly found that even a "quick comparison with the facts of the racial gerrymandering cases on which *Bandemer* was based demonstrates the distance of the Republicans from alleging a claim." Jur. St. App. at 18a. *Cf.* Jur. St. at 14 (Appellants attack district court's analysis as "both incomplete and inappropriate").

Plaintiffs cannot credibly argue, for example, that their case approaches the complaint of Blacks in *Rogers v. Lodge,* 458 U.S. 613 (1982), who constituted 38% of the voters but had never won a single seat; or the Blacks in *Mobile v. Bolden,* 446 U.S. 55 (1980), who constituted one-third of the electorate but had likewise never won a seat. *See* Jur. St. App. 18a-19a. Nor is the claim here like the Voting Rights Act claim in *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752 (1986). In that case the Court emphasized that "minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process" (106 S.Ct. at 2764), and relied upon findings that Black voters enjoyed "only minimal and sporadic success in electing representatives of their choice," and that what success they did enjoy was due to "aberrational" circumstances. *See id.* at 2762, 2771, 2772 n.29; *see also id.* at 2794 (O'Connor, J., concurring).

The district court limited its discussion to cases in which this Court has upheld racial gerrymandering claims. A comparison of the instant case with race cases in which this Court and lower courts have rejected gerrymandering claims makes the weakness in plaintiffs' complaint even more evident. Thus, in *Whitcomb v. Chavis, supra,* 403 U.S. 124, this Court rejected a claim of racial gerrymandering based upon much more persuasive allegations than those here. The Court drew a sharp distinction between election results and the degradation of political influence:

> The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.
>
> 403 U.S. at 153.[16]

Even the most extreme and longstanding disproportionate election results have been held insufficient to support constitutional gerrymandering claims when courts were not convinced of the plaintiffs' inability to influence the broader political processes. *See Leadership Roundtable v. City of Little Rock*, 499 F.Supp. 579 (E.D. Ark. 1980), *aff'd*, 661 F.2d 701 (8th Cir. 1981) (only three Black candidates had won contested elections in Little Rock, Arkansas since 1957, but court held Blacks had equal opportunity to participate in the political process); *Washington v. Finlay, supra*, 664 F.2d 913 (no constitutional violation when, although no Black had ever been elected to the city council, there was substantial Black employment in city jobs, allocation of federal grants to the Black community, equal provision of essential services, and some Blacks held appointed offices in city and county government); *Aranda v. Van Sickle*, 600 F.2d 1267 (9th Cir. 1979), *cert. denied*, 446 U.S. 951 (1980) (Hispanics not denied equal access to the political process even though only three Hispanics had been elected to city council since 1911); *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978) (district court finding of constitutional violation reversed even though the only Black who ever ran for office was soundly defeated); *Nevett v. Sides*, 571 F.2d 209, 227 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980) ("blacks have not had the door completely closed in their faces in so far as expressing their opinions at city council meetings, in seeking

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[16] Applying this distinction to the Indiana Democrats, the *Davis* Court said:

> For constitutional purposes, the Democratic claim in this case, insofar as it challenges *vel non* the legality of the multi-member districts in certain counties, is like that of the Negroes in *Whitcomb* who failed to prove a racial gerrymander, for *it boils down to a complaint that they failed to attract a majority of the voters in the challenged multi-member districts.*
>
> *Davis, supra*, 106 S.Ct. at 2813 (emphasis added).

assistance, presenting petitions, being heard, and on some occasions being given what amounts to private audiences . . . some of these requests have gotten answers . . . there has not been a total lack of responsiveness merely because there were no blacks on the city council"); *Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977) (no constitutional violation despite the fact that in all but two elections since 1971 Black candidates were nominated for the school board, campaigned aggressively, qualified to run in the final election, but were never elected); *Romero v. City of Pomona*, 665 F.Supp. 853 (C.D. Cal. 1987) (rejecting Voting Rights Act claim even though only two Hispanics and no Blacks had been elected to the city council since 1888); *Houston v. Haley*, 663 F.Supp. 346 (N.D. Miss. 1987) (holding that political process was equally open to participation by Blacks even though no Black had ever served as mayor or been elected alderman).

The partisan claim presented here can be sustained only if this Court is willing to prefer political parties over racial minorities and close its eyes to the treatment and judicial standards that racial minorities have met when raising claims of racial gerrymandering. The *Davis* plurality specifically embraced the analogy to racial cases and held that "the principles developed in these cases would apply equally to claims by political groups in individual districts." 106 S.Ct. at 2810 n.12. It did so with full knowledge that political groups would have difficulty presenting a viable claim:

> We note, however, that the elements necessary to a successful vote dilution claim may be more difficult to prove in relation to a claim by a political group. For example, historical patterns of exclusion from the political processes, evidence which would support a vote dilution claim, are in general more likely to be present for a racial group than for a political group.
>
> *Id.*

In *Davis*, the Court not only imposed on political parties the demanding standards developed in race cases, it added a requirement, applicable solely to *partisan* claims, and designed to *increase* the burden on political parties seeking judicial intervention. In partisan cases and only in partisan cases, the plaintiffs must at

the threshold make a "heightened" showing of discriminatory effect. 106 S.Ct. at 2815 n.19. The plaintiffs in this case, who hold 40% of the California congressional delegation and have enormous power to influence the political processes, are unable to meet this "heightened" showing requirement or even the established elements essential to a gerrymandering claim.

D. California Republicans Are In Fact Proportionally Represented in the Congressional Delegation

Even analyzing plaintiffs' case in terms of proportional representation, they have no claim. Thirty-eight percent of California's registered voters are Republicans; forty percent of California's congressional delegation are Republicans.

1. Plaintiffs' Claims of Disproportionality Are Based on a False Measure

Plaintiffs ignore registration figures and turn to the statewide votes-to-seats ratio to demonstrate disproportionality.[17] The votes-to-seats ratio lumps together votes from the 45 congressional districts, treating the total number of votes cast for all Republican congressional candidates as an aggregate and the total number of votes cast for all Democratic candidates as an aggregate.

The analytical flaws in using statewide votes-to-seats ratios to assess outcomes in single member winner-take-all districts are manifold, and the results will virtually always be substantially disproportionate.[18] *See* Cain, *Simple vs. Complex Criteria for*

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[17] Plaintiffs cite the statewide aggregate figures from 1982, 1984 and 1986. Third Am. Complaint, ¶ 26, Jur. St. App. at 47a-49a; Jur. St. at 8-9. The 1982 elections were not held under A.B. 2X, but under a prior plan implemented by a unanimous vote of the California Supreme Court. *Assembly v. Deukmejian*, 30 Cal.3d 638, 664 (majority), 679 (Richardson, J., concurring & dissenting, with Mosk, J. and Kaus, J., concurring), *appeal dismissed sub nom. Republican National Committee v. Burton*, 456 U.S. 941 (1982).

[18] For example, plaintiffs' third amended complaint endorses, as a prototype of fair districting, the congressional districts used in California in the 1970s and developed by court-appointed masters. *See* Third Am.

Partisan Gerrymandering: A Comment on Niemi and Grofman, 33 U.C.L.A. L. Rev. 213, 216-17 (1985); Note, *The Constitutional Imperative of Proportional Representation,* 94 Yale L.J. 163, 164 n.4, 172 (1984); Grofman, *For Single Member Districts Random Is Not Equal,* in Representation and Redistricting Issues (1982) 55; Dixon, *The Court, The People and "One Man, One Vote",* in Reapportionment in the 1970s (N. Polsby, ed., 1971) 13; De Grazia, *Public and Republic: Political Representation in America* (1951) 187.

The Court need not at this stage of the proceedings concern itself with the full range of problems with using the votes-to-seats ratio, because two immediately apparent flaws in this measure of proportionality demonstrate the fallacy of plaintiffs' argument.

First, the votes-to-seats ratio treats the 45 separate district elections and the many individual candidates as though they were a single statewide election between the Democratic Party and the Republican Party. It fails to take account of varying voter turnout among the districts or of the individual strengths and weaknesses of the candidates and their campaigns.

Complaint, §§ 19, 25, Jur. St. App. at 40a, 47a; *Legislature v. Reinecke,* 10 Cal.3d 396 (1973). The votes-to-seats ratios under the 1970s districts are, however, very comparable to those in the 1980s. In 1982 and 1984, the margin of disproportionality was between 9% and 10%; in 1986 it was about 6%. By comparison, in 1974, the first year under the Masters Plan, there was a 6.1% disproportionality; Republican candidates took 41% of the statewide vote but only 34.9% of the congressional seats. In 1976, they received 43.2% of the statewide vote but lost a seat, leaving them with only 32.6% of the delegation. This 10.6% margin of disproportionality is greater than that in either 1982 or 1984. In 1978, with 47.6% of the statewide vote, Republican candidates won only 39.5% of the delegation seats, an 8% disproportionality. In 1980, the end of the decade when districts were at their *worst* in terms of population equality, Republican candidates had their best year under the Masters Plan, taking 48.8% of the delegation seats with 51.1% of the statewide vote. (These figures are derived from the Statements of the Vote for these years issued by the California Secretary of State, which are part of the record in the district court.)

To understand that the individual is more important than the party in California politics, one need only note that California's Governor is a Republican, while its Lieutenant Governor is a Democrat; similarly, one United States Senator is a Republican and one is a Democrat. Voter focus on the individual candidate, rather than the candidate's political party, is particularly important in congressional district elections. *See* Mayhew, *Congress: The Electoral Connection* (1974) 26 ("a congressman can—indeed must—build a power base that is substantially independent of party") and 27 ("no theoretical treatment of the United States Congress that posits parties as analytic units will go very far"). *See also* Jewell, *The Consequences of Single- and Multi-member Districting,* in Representation and Redistricting Issues, *supra*, 132-34 (a single-member district representative provides constituent services to everyone in the district and is expected to bring government contracts, industry and other economic benefits to the district).

Second, the votes-to-seats ratio urged by plaintiffs establishes a measure of proportionality in which the touchstone is not Republicans or "true believers" (*i.e.*, Republicans who can be counted on to vote for Republican candidates). *See Davis v. Bandemer, supra,* 106 S.Ct. at 2811 n.15. Instead, the base for measuring proportionality in plaintiffs' view is the percentage of voters statewide who in any given election voted for Republican congressional candidates, regardless of whether the voter was a Republican, a Democrat, a member of a third party, or an independent. Plaintiffs propose defining "Republican voting strength" to include "registered Republicans *and those who tend to vote for Republican candidates.*" Jur. St. at 8 (emphasis added); *see also id.* at 26. This expansion of the base is terribly misleading.[19]

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[19] It is not clear how far plaintiffs seek to expand this base. The individual plaintiffs, registered Republicans, stop short of claiming they *always* vote for Republican candidates for Congress. Third Am. Complaint, ¶ 1, Jur. St. App. at 32a. The larger group of "Republican voters" plaintiffs call the "core of Republican voting strength" are described as voters "who in fact vote for Republican candidates and will predictably do so in the future." Third Am. Complaint at ¶¶ 2 and 3, Jur. St. App. at 33a. "Vote" does not mean vote in every election or even frequently; and

In race cases, for example, the courts have never included "cross-over" white voters who vote for minority candidates in assessing levels of disproportionality or establishing some fair level of representation. *See, e.g., Thornburg v. Gingles, supra,* 106 S.Ct. at 2752, 2761, 2776, 2780, 2794. Rather, courts look to the size of the minority group itself. *Ibid.* In the context of political parties, registration figures would be the comparable measure.[20]

2. Republicans have had proportional representation in California's congressional delegations for at least two decades

If one looks at proportionality using registered Republicans as the base, then Republicans enjoy at least proportional representation in California's congressional delegation and have for years. In 1986, Republicans, with 37.8% of the registered voters, held 40% of the seats in California's Congressional delegation. They also had 40% of the delegation in 1984, although as of November 1984 only 36.5% of registered voters were Republicans. In 1982, they held one less seat, 37.8% of the delegation, but only 34.9% of the voters were registered Republicans. In 1980, they held 48.8% of the seats with only 34.7% of the registered voters. *See* Statements of the Vote and Reports of Registration issued by the California

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"predictably" is far from certainly. This is an amorphou group at best. If a constitutionally protected class can be defined in this loose a manner it "would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall,* 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting); *Whitcomb v. Chavis, supra,* 403 U.S. at 156-57. *See generally* Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 151-53.

[20] Using registered Republicans as the base is most generous to plaintiffs, for they have not pled, nor could they prove, that registered Republicans always, or even routinely, vote for Republican candidates. We do not concede that only Republican legislators can represent Republican voters. As Abraham Lincoln said when he ran for reelection to the Illinois Assembly in 1836,

> If elected, I shall consider the whole people of Sangamon my constituents, as well those that oppose as those that support me.

De Grazia, *Public and Republic: Political Representation in America, supra,* 127.

Secretary of State for 1980, 1982, 1984. Figures for the 1970s are comparable. *See* Statements of the Vote for 1974, 1976 and 1978.[21]

This sort of "persistent proportional representation is inconsistent" with an allegation of discrimination in the electoral system.[22] *Thornburg v. Gingles, supra,* 106 S.Ct. at 2780. *See also id.* at 2793 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J., concurring). In short, even on their own terms, the plaintiffs have not pled and cannot plead a constitutional violation.

E. Republicans Have Enormous Political Influence in Congress and in Every Other Relevant Political Arena

Plaintiffs have not alleged and could not truthfully allege that Republicans are denied meaningful representation or substantial political influence at either the federal or the state level. Perhaps for this reason, they seek to avoid the issue. Instead, they argue that because their challenge is to congressional districts, any judicial assessment of Republican political power must be limited to the Congress and the California congressional delegation. Jur. St. at 12-14.[23]

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[21] All of these documents are part of the record in the district court.

[22] Blacks and Hispanics enjoy much less proportional representation in the California congressional delegation than do Republicans. One of the aims and achievements of A.B. 2X was to increase Hispanic representation and not retrogress in Black representation. Under A.B. 2X two additional Hispanic candidates have been elected to the House of Representatives from California and the number of Black representatives has not decreased.

[23] Indeed, appellants would limit the judicial focus even further to "the congressional electoral process" or what they call "the political process directly involving or resulting in election to the offices which are the focus of appellants' complaint." Jur. St. at 12. Appellants' constricted view of the relevant forum for evaluating their political power is ironic given their expansive view of what constitutes "Republican voting strength" for purposes of measuring proportionality. *See* section I-D-1, *supra.*

Under appellants' constrained approach the courts would ignore the existence of a popular Republican President with power to propose legislation to the House of Representatives, lobby its members, veto its bills, and negotiate the impact of his proposals and vetoes. Under appellants' approach, the courts would also have to ignore the fact that California has a popular Republican Governor, who is eligible for reelection in 1990 and would have veto power over new districting plans. This Court's jurisprudence and the racial gerrymandering cases reject such a myopic view of political power. Established law permits and requires courts assessing partisan gerrymandering claims to analyze the plaintiffs' political power and participation in the broader context—be it the city, the county, the state or the federal government. *See, e.g., Davis v. Bandemer, supra,* 106 S.Ct. at 2810-13, 2814; *Washington v. Finlay, supra,* 664 F.2d at 922-23.

Moreover, regardless of which perspective on political power one adopts—the extremely narrow one proposed by appellants or the broader one required by this Court—the conclusion is the same: Republican clout and participation are substantial.

Republican influence and power in the process of congressional redistricting in California is a matter of public record. As the district court noted, plaintiffs' own complaint shows that when Republicans did not like the districts adopted by the Legislature in A.B. 301, they successfully sponsored a referendum disapproving those districts. *See* Third Am. Complaint, ¶ 11, Jur. St. App. 17a-18a, 36a. Instead of exercising their demonstrated political power to refer A.B. 2X, however, plaintiffs eschewed the political forum and sought judicial intervention. Dissatisfied Republicans' decision not to exercise their political influence does not make that power any less real.[24]

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[24] California Republicans' ability to influence the 1980s redistricting is further evidenced by the fact that in 1982 Republicans successfully referred the state legislative districting plans as well (*see Legislature v. Deukmejian,* 34 Cal.3d 658, 667 (1983)), and then negotiated bipartisan districting plans for the state Senate and Assembly that passed by more than a two-thirds vote in each house. Cal. Stats. 1983-84, ch. 8, §§ 4, 6, 8; Cal. Const., art IV, § 8(d).

Eighteen members—40%—of the California congressional delegation and 176 members of the United States House of Representatives are Republicans. Even if Republicans are, as plaintiffs claim, unable to elect a Republican candidate in certain districts, their partisan interests can be and are represented by Republican members from other districts. *See United Jewish Organizations v. Carey,* 430 U.S. 144, 166 n.24 (1977) ("The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county").

Moving beyond the House of Representatives to the "political process as a whole" (*Davis v. Bandemer,* 106 S.Ct. at 2810), Republican influence is even more evident. Until 1987, Republicans held a majority in the United States Senate. There are still 45 Republican Senators. California Republicans hold both the presidency and the governorship. Republicans hold 15 of California's 40 State Senate seats and 36 of the 80 Assembly seats. Republicans hold judicial positions at every level, along with control over judicial appointments to state and federal courts. There are also numerous Republican appointed officials at every level of government.

These are not the markings of a politically disadvantaged group. Plaintiffs have no constitutional claim for partisan gerrymandering.

II

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' REMAINING CLAIMS

In addition to the partisan gerrymandering claims, plaintiffs' third amended complaint alleges additional claims based upon article I, section 2, the First Amendment and the Guarantee Clause. Plaintiffs alleged no additional or different facts in support of these alternative legal theories; nor can they cite any legal authority that the constitutional provisions which they invoke apply in this context. The district court rightly found these claims without merit.

A. Article I, Section 2 of the Constitution Does Not Apply Here

Appellants argue that *Wesberry v. Sanders*, 376 U.S. 1 (1964) supports their claim that article I, section 2 of the United States Constitution "applies to both numerical *and* political gerrymanders." Jur. St. at 23. The district court was entirely correct, however, in stating that *Wesberry* and cases since support the conclusion that " 'population alone has been the sole criteria of constitutionality in congressional redistricting under Art. I, § 2 . . . . ' " Jur. St. App. at 20a-21a (quoting *Mahan v. Howell*, 410 U.S. 315, 322 (1973)); *see also Karcher v. Daggett*, 462 U.S. 725, 734 n.6 (1983) (describing an article I, section 2 case as doing "little to prevent what is known as gerrymandering" and being limited to "achieving population equality").[25]

The language of article I, section 2 barely gave the Court in *Wesberry* an opening to hold that this provision requires *intra*-state population equality. It says only that "[t]he House of Representatives shall be composed of members chosen every second year by the people of the several states . . . " and that "[r]epresentatives . . . shall be apportioned among the several States . . . according to their respective numbers . . . . " As Justice Stevens pointed out in *Karcher v. Daggett*, the language says nothing about composition *within* a state, only about apportionment among the states. *Karcher v. Daggett, supra*, 462 U.S. at 745 (concurring opinion). The *Wesberry* Court found the population

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[25] Nor does *Daggett v. Kimmelman*, 580 F.Supp. 1259 (D. N.J. 1984), *aff'd* 467 U.S. 1222 (1984) support appellants' position. The fact that a district court implementing *Karcher's* strict reading of article I, section 2 selected at the remedy phase a plan which it said did not involve "an intentional gerrymander" does not have anything to do with what article I, section 2 requires. The district court explicitly did so not because it found any command in article I, section 2, but because avoiding partisan gerrymandering was a legitimate goal for the state or the court to consider when selecting from among competing plans. 580 F.Supp. at 1261. That district court also held that "preserving cores of prior districts" was a legitimate goal. By appellants' reasoning, this statement by the *Daggett* court would amount to a ruling that article I, section 2 includes such a requirement.

equality requirement not in the strict language of the section, but by interpretation in light of the *Debates of the Constitutional Convention* and the contemporaneous writing of our founders. *Wesberry, supra,* 376 U.S. at 8-18.[26] None of these sources supports the interpretation that appellants propose here.

Appellants extract phrases from *Wesberry* that are classic formulae of population equality and then argue that they embrace this partisan gerrymandering claim. *See* Jur. St. at 23-25. Theirs is an exercise in sophistry: because one-person-one-vote claims are cognizable under both the Fourteenth Amendment and article I, section 2, and because *Davis v. Bandemer* held partisan gerrymandering claims cognizable under the Fourteenth Amendment, then appellants imply, such claims must also arise under article I, section 2. But this Court in *Davis* made it clear that partisan gerrymandering claims are Fourteenth Amendment discrimination claims and that they are not favored. There is no reason to stretch to bring such claims within the ambit of article I, section 2. Both the language and the history of that section limit its mandate to equipopulous districts.

B. Plaintiffs' Complaint Does Not State a Plausible First Amendment Claim

Appellants have presented in this case the same First Amendment theories that their counsel offered to this Court in an amicus brief filed on behalf of the Republican National Committee in *Davis v. Bandemer.*[27] No member of this Court even mentioned this alternative legal theory in *Davis v. Bandemer.* Appellants are unable to point to a single court that has held the First Amendment applicable to redistricting. Instead, they cite cases on campaign expenditures, ballot access, and party convention rules.

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[26] Madison, in *The Federalist No. 57,* for example, assumed that Pennsylvania would divide districts on an equipopulous basis. *The Federalist Papers* (Bantam Classic ed. 1982) 293. *See also The Federalist No. 54* (Madison), *id.* at 277 ("numbers" are "the only proper scale of representation").

[27] *See* Brief Amicus Curiae of the Republican National Committee in Support of Appellees filed in *Davis v. Bandemer,* No. 84-1244, at 8-17.

These cases have nothing to do with redistricting, and as the district court held, they provide no support for plaintiffs' claim.

The cases which appellants cite share an important characteristic that is utterly absent in the redistricting context. Each case involves direct *exclusion* of the aggrieved individuals or parties from participation in an important phase of the electoral process, or direct interference in the internal workings of a political party. Plaintiffs have not pled, nor can they plead, such direct and substantial restrictions on, or interference with, protected speech or association. The district court correctly found that they have no First Amendment claim.

C. Plaintiffs Have No Claim Under the Guaranty Clause

Plaintiffs' claim under the Guaranty Clause is disposed of by *Baker v. Carr*, 369 U.S. 186 (1962):

> This case does, in one sense, involve the allocation of political power within a State, and the appellants might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, *any reliance on that clause would be futile.* But because any reliance on the Guaranty Clause could not have succeeded it does not follow that appellants may not be heard on the equal protection claim which in fact they tender. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here.

Baker v. Carr, supra, 369 U.S. at 226-27 (emphasis added).

Appellants rely on a statement in *Reynolds v. Sims*, 377 U.S. 533, 582 (1964), describing *Baker* as stating that "some questions raised under the Guaranty Clause are nonjusticiable, . . ." Jur. St. at 28. They omit the accompanying footnote in which this Court expressly noted the *Baker v. Carr* discussion of "the nonjusticiability of malapportionment claims asserted under the Guaranty Clause." 377 U.S. at 582 n.64.

CONCLUSION

It may be that the two major political parties in this country could never plead the facts necessary to justify judicial intervention in their redistricting disputes. If this is so, it is because, despite their complaints, they continue to enjoy such enormous political power that they are properly left to political remedies. On the other hand, it may be that at some time and in some place Republicans or Democrats could plead the pervasive and persistent degradation of their political influence that calls for judicial intervention. As the district court ruled, this is not such a case.

This Court should deny jurisdiction for lack of a substantial federal question. Alternatively, the decision of the district court should be summarily affirmed.

Respectfully submitted,

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